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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

KHALID PARWEZ,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an attempt by the State of California to use the words "especially heinous, atrocious and cruel," in describing a murder for which the murderer is eligible for the death penalty, prevented by either the Eighth Amendment or limitations on vagueness emanating from the Due Process Clause of the 14th Amendment?

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PETITION FOR WRIT OF CERTIORARI

The People of the State of California petition this Court for a writ of certiorari to review the judgment and unpublished opinion of the Court of Appeal for the State of California, Second Appellate District, Division Five, which, as the basis for its judgment, relied upon an earlier opinion of the Supreme Court of the State of California in a case entitled *People* v. *Superior Court (Engert)*, 31 Cal.3d 797 (1982), hereinafter, *Engert*. The decision by the state Supreme Court in *Engert*, which governed the Court of Appeal in this case, rests upon an intertwining of federal and state grounds. This case therefore involves a federal question, namely, can a state statute, without violating the Eighth Amendment or the limitations on vagueness emanating from the Due Process clause of the Fourteenth Amendment, make a criminal defendant in a murder case eligible for the death penalty when the murder was "especially heinous, atrocious, and cruel"?

The Court of Appeal in this case was bound by *Engert*, which said, "No." However, the People of the state contend that such a provision, passed by the electorate as an amendment to the California Penal Code in a statewide election, can co-exist with the United States Constitution.

OPINIONS BELOW - RULE 21.1(d)

The unpublished opinion of the California Court of Appeal is contained in the appendix at pages A-1 to A-3. The order of the California Supreme Court denying the petition for review of the opinion of the Court of Appeal is contained in the appendix at page A-4. The order of the Court of Appeal staying issuance of the remittitur is contained in the appendix at page A-5.

JURISDICTION - RULE 21.1(e)

The California Court of Appeal, Second Appellate District, Division Five, entered its judgment and opinion on September 13, 1988. On October 19, 1988, the People filed a timely petition for review with the California Supreme Court. On December 22, 1988, the petition for review was denied. Title 28, United States Code, section 1257(3), confers jurisdiction on the Court in this case. Title 28, United States Code, section 2403(b), may be applicable.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). Since filed within 60 of the California Supreme Court's denial of review, this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - RULE 21.1(f)

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

"A person may not be deprived of life, liberty or property without due process of law . . . ." CAL. CONST., art. I, § 7(a).

"Persons may not . . . be deprived of life, liberty, or property without due process of law." CAL. CONST., art. I, § 15, cl. 7.

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

" . . . .

"(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim." CAL. PEN. CODE § 190.2(a)(14).[1]

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1. The full text of section 190.2 is set forth verbatim at pages A-6 to A-10.

"When an action is dismissed by a magistrate pursuant to Section . . . 1008, . . . or a portion is dismissed pursuant to those same sections . . . , the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof . . . ." CAL. PEN. CODE § 871.5(a).[2]

"The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

" . . . ;

"4. That the facts stated do not constitute a public offense . . . ." CAL. PEN. CODE § 1004.

STATEMENT OF THE CASE - RULE 21.1(g), (h)

A felony complaint filed in the Municipal Court of the Pomona Judicial District, County of Los Angeles, charging respondent Parwez with the murder of Rahael Parwez alleged, as a special circumstance making respondent eligible for the death penalty, that "the murder was especially heinous, atrocious and cruel."[3] CT 1A, 5, 17.[4] No other allegation makes respondent eligible for the death penalty. The magistrate sitting in that court sustained respondent's demurrer to the special circumstance allegation. CT 4, 19, 22-26. Parwez argued in support of his demurrer that the state supreme court had found in *Engert* that subdivision (a)(14) of section 190.2, describing the special circumstance with which the complaint charged him, violated the Due Process clauses of both the United States Constitution and the California Constitution,

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2. The full text of section 871.5 is set forth verbatim at pages A-11 to A-13 of the appendix.

3. CAL. PEN. CODE § 190.2(a)(14). All further statutory references are to the California Penal Code, except as otherwise noted.

4. References are to pages of the Clerk's Transcript on Appeal, CT, and the Reporter's Transcript on Appeal, RT.

CT 24-25, and that the lower state courts were bound to follow the decision of the California Supreme Court. CT 26.

Upon review of the magistrate's ruling on a motion brought by the People pursuant to section 871.5, the Los Angeles County Superior Court refused to compel the magistrate to reinstate the special circumstance allegation. CT 9-16, 32; RT 5. The motion by the People was based upon the argument that subdivision (a)(14) of section 190.2 is constitutional. CT 13-14. Both the magistrate and the Superior Court judge concluded that the state supreme court's decision in *Engert*, holding that subdivision (a)(14) of section 190.2 violated the federal and state constitutions, barred the special circumstance allegation. Appendix, p. A-2.

The People appealed on the ground that the California Supreme Court's decision in *Engert* was erroneous. Appendix, p. A-2. The appeal went to Division Five of the California Court of Appeal, Second District. In that court, the parties stipulated that, as required by state law,[5] the decision of the highest state court, in *Engert*,[6] was binding upon the Court of Appeal. Appendix A, p. A-2, fn. 1. The People also notified the Court of Appeal by letter that the People entered into the stipulation with the "understanding that an affirmance . . . does not preclude [the People] from seeking review [of the federal question] in the United States Supreme Court, depending upon the result in the California Supreme Court." Appendix, pp. A-14 to A-15. The Court of Appeal accepted the stipulation and affirmed, entering its judgment and opinion on September 13, 1988. Appendix A, pp. A-1 to A-3.

The California Supreme Court denied a petition for review of the opinion of the Court of Appeal on December 22, 1988. Appendix, p. A-4. On petitioner's application, the Court of Appeal ordered issuance of its remittitur stayed to

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5. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962).

6. See *Engert*, 31 Cal.3d at 806-809; also 809 (conc. opn.) and 814 (dissent).

March 24, 1989. Appendix, p. A-5. The People have filed this Petition for Writ of Certiorari seeking review of the holding in *Engert* and the judgment of the Court of Appeal as dictated by *Engert*. Unless the Court grants relief, the People of the state will be unable to offer proof on the allegation that the alleged murder was "especially heinous, atrocious and cruel" and will therefore be unable to seek the sentences of death or life without parole should Parwez be convicted of the charged murder in the first degree. See § 190.2(a).

REASONS FOR ALLOWANCE OF THE WRIT - RULE 21.1(j)

The highest court of the State of California, in *Engert*, and, at least since *Engert* binds it, the Court of Appeal in this case, have "decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17.1(c). In *Engert*, the California Supreme Court decided "that subdivision (a)(14) in section 190.2 is unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment of the United States Constitution and article I, sections 7, subdivision (a), and 15 of the Constitution of the State of California." 31 Cal.3d at p. 806.

This Court's recent opinion in *Maynard v. Cartwright*, __ U.S. __, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988), hereinafter *Maynard*, makes it clear that (1) the state Supreme Court based its decision in *Engert* upon an erroneous analytical standard and (2) application of the proper standard leads to the conclusion that the federal constitution permits an "especially heinous, atrocious or cruel" special or aggravating circumstance, so long as "some narrowing principle"[7] or "limiting construction"[8] is used by the trier of fact in the application of this special circumstance to the facts of the case.

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7. *Maynard*, 100 L.Ed.2d at 381, 108 S.Ct. at 1859.

8. *Ibid.*

The erroneous analytical standard used by the California Supreme Court led the court to conclude that the very wording of subdivision (a)(14) precluded a court from finding what this Court in *Maynard* subsequently termed a "narrowing principle."[9] Yet the words in the Oklahoma statute considered by the Court in *Maynard* are identical to words which the California Supreme Court in *Engert* held cannot meet "the standards of precision and certainty required of statutes . . . ." 31 Cal.3d at 802. Comparison of *Engert* with *Maynard* shows that the California Supreme Court misjudged federal law and "fundamantal principles of due process," 31 Cal.3d at 804, when it held that the very words used in subdivision (a)(14) automatically violated the due process clause of the United States Constitution because they could not provide sufficient certainty for the imposition of the death penalty. 31 Cal.3d at 806.

Although *Engert* was based upon both federal and state grounds, it is clear from the opinions,[10] that the "decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ." *Michigan v. Long*, 463 U.S. 1032, 1040, 77 L.Ed.2d 1201, 1214, 103 S.Ct. 3469, 3476 (1983).

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9. Thus, in *Engert*, both the methodology, as well as the conclusion derived therefrom, were faulty. The method was faulty because in judging the statute, the California Court read the words of the statute in the abstract, without regard to any actual application to the facts of any particular case or cases. The Constitution does not require the statute to pass that kind of a test. Had the course outlined in *Maynard* been pursued, the Court might have achieved a narrowing principle or limiting construction in applying the statute and thus preserved the intent which we hope to be able to argue to the state courts was manifest in enactment of the statute.

10. Compare the concurring opinion in *Engert*, wherein one Justice stated he would "rely solely on the California Constitution," 31 Cal.3d at 809, with the majority opinion, which grounds its decision as well on the United States Constitution, calling the heinous murder special circumstance "unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment," 31 Cal.3d at 806, and attempts to distinguish the context of this Court's otherwise binding opinion in *Proffitt* v. *Florida*, 428 U.S. 242, 49 L.Ed. 913, 96 S.Ct. 2960 (1976), on a basis which implicity recognizes the importance of the federal grounds. 31 Cal.3d at 804-806. See the discussion, *post*, at pages 10-11.

Thus, the most reasonable explanation for the decision of the California Supreme Court in *Engert* is that it "decided the case the way it did because it believed that federal law required it to do so." *Ibid.* The state court has thus erroneously decided a federal question while erroneously interpreting the state constitution. In order to properly analyze the federal question presented in this case, the background of the issue in the California courts must be recounted. Part of that background is noted in *Allen v. Superior Court* 113 Cal.App.3d 42 (1980), disapproved in *Engert*, 31 Cal.3d at 806:

> We note that the First District in *People* v. *Superior Court (Engert)* (1980) 105 Cal.App.3d 365 [164 Cal.Rptr. 210] [later ordered deleted by the California Supreme Court] agreed with the vagueness contention advanced by petitioner. Our state Supreme Court then denied a petition for hearing in *Engert*. The remittitur in the opinion was stayed because the Attorney General filed a petition for certiorari to the United States Supreme Court. The court granted certiorari in *Engert*, vacated the opinion, and remanded the matter to the First District so it could specify whether the ruling was based on federal and/or state constitutional grounds. [*California* v. *Superior Court*, 449 U.S. 945, 101 S.Ct. 344, 66 L.Ed.2d 209 (1980).]

113 Cal.App.3d at 49.

Thereafter, the Court of Appeal considering *Engert* stated its decision was on both federal and state grounds. Pub. in adv. sheets at 120 Cal.App.3d 721,[11] hg. granted Cal. Supreme

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11. The opinion reads in full:

> THE COURT:*–On December 3, 1980, the Supreme Court of the United States granted certiorari in these causes, vacated the

(continued...)

Ct. (Sept. 23, 1981). When the California Supreme Court later decided *Engert*, it also relied upon both federal and state constitutional provisions, although one concurring Justice would have relied solely upon the California Constitution. 31 Cal.3d at 809. In light of *California v. Krivda*, 409 U.S. 33, 34 L.Ed2d 45, 93 S.Ct. 32 (1972), the effect at the time was, as noted by a dissenting Justice:

> In any event, the majority, in familiar fashion, has precluded any high court review of the vagueness question as applied to section 190.2, subdivision (a), by its reliance upon both federal and *state* constitutional provisions to justify its holding. In my view, the majority's reliance upon the state Constitution, thereby shutting the door to the People who might otherwise have sought further review, frustrates the spirit, if not the letter, of article I, section 27 of the California Constitution, which validated the death penalty laws in this state. As we carefully observed in *Frierson*,[12] the people adopted that constitutional provision in November 1972 for the purpose of "reinstating the death penalty to the extent permitted by *federal* constitutional law." (P. 186, italics added.) I have no reasonable doubt that the statutory provi-

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11. (...continued)
judgment of this court, and remanded with directions "to consider whether [the] judgment is based on federal or state constitutional grounds, or both." The majority of this court have reexamined their opinion (reported at 105 Cal.App.3d 365) and certify that they relied on both the due process clause of the Fourteenth Amendment of the United States Constitution and article I, sections 7(a) and 15, of the Constitution of the State of California. Poché, J., having dissented from the majority opinion, does not join in this certification.

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*Before Rattigan, Acting P.J., Christian, J., and Poché, J.

12. *People v. Frierson*, 25 Cal.3d 142 (1979).

sion at issue here is constitutional under federal law. (*Proffitt* v. *Florida*, *supra*, 428 U.S. at pp. 255-256.

31 Cal.3d at 814.

However, since the penning of those dissenting lines, federal law has changed, and the *Engert* opinion would now be subject to review by this Court in light of *Michigan v. Long*. There this Court held that it would review a decision of a state court when that decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . ." 463 U.S. at 1040. *Engert* decided a federal question, and is, therefore, now subject to review by this Court through the vehicle of the case at bar, albeit that at the time *Engert* was declared by the California Supreme Court to rest on both state and federal grounds, it was not then subject to such review.

Engert also decided the question incorrectly. In *Engert*, the California Supreme Court held that *Proffitt v. Florida*, *supra*, 428 U.S 242, was not applicable "because of the differing contexts in which the provision is found and the different issues before the courts . . . ." 31 Cal.3d at 806. The essence of the distinction found by the California Supreme Court was that the "heinous" murder provision in the Florida statute was an aggravating circumstance which was used to determine if a defendant should receive the death penalty, whereas California's "heinous" murder provision was used as part of the definition of the crime to determine if the defendant was death eligible. Thus, the California Supreme Court deemed the two statutes to be procedurally different for purposes of federal constitutional law. This distinction was erroneous.

This Court has made it clear that, for purposes of the federal constitution, a statute such as California's, which narrows the class of capital eligible defendants through the use of jury findings at the guilt phase of a trial, is the equivalent of a statute which "more broadly define[s] capital offenses and

provide[s] for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield v. Phelps*, 484 U.S. ____ , 98 L.Ed.2d 568, 582, 108 S.Ct. 546, 555 (1988). Thus, one of the underpinnings of *Engert* has been removed.

But that is not all that has been removed. In *Engert*, the California Supreme Court concluded that the appropriate constitutional issue was one of due process and not an Eighth Amendment issue. See *People v. Bean*, 46 Cal.3d 919, 957 (1988). Yet, in light of the fact that narrowing through capital eligibility is the equivalent of narrowing through penalty aggravating circumstances, this Court has also made it clear that the proper issue to consider is an Eighth Amendment issue. In *Maynard*, the Court stated:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

108 S.Ct. at 1858, 100 L.Ed.2d at 380. The Court noted that "the difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment." 108 S.Ct. at 1858, 100 L.Ed.2d at 380.

Yet even if a Due Process Clause approach were the proper approach to the determination of the constitutionality of subdivision (a)(14), *Maynard* also makes it clear that the result in *Engert* was wrong:

> Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.

108 S.Ct. at 1858, 100 L.Ed.2d at 380. In *Engert*, the California Supreme Court did not consider the vagueness issue on an as-applied basis, but instead, concluded that subdivision (a)(14) was unconstitutional on its face without any consideration of its application to a particular situation. And so, whether a Due Process or an Eighth Amendment approach is used in determining the constitutionality of a statute which contains the phrase "especially heinous, cruel or atrocious," *Maynard* makes it clear that the crux of the issue is whether "some narrowing principle" or "limiting construction" can be applied to a statute such as subdivision (a)(14) to provide adequate notice to a defendant and adequate guidance to a jury. 108 S.Ct. at 1859, 100 L.Ed.2d at 381. It is obvious that such limitations can be placed upon the language of the California statute just as easily as they can be placed upon other states' similar statutes.[13]

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13. Under California law, a statute "must be upheld unless its unconstitutionality 'clearly, positively and unmistakably appears.'" *In re Dennis M.* 70 Cal.2d 444, 453 (1969). Seventeen states have adopted death penalty statutes that include words identical to one or more of the words in the "heinous, cruel or atrocious" phrase of the California statute. (See ALABAMA CRIM. CODE, 13A-5-49; ARIZONA CRIM. CODE, 13-703(f)(g); ARKANSAS STATS., 5-4-604; COLORADO REV. STATS., 16-11-103(6)(g); CONNECTICUT PEN. CODE, 53a-46a(n); FLORIDA STATS., (4)921.141(5)(h); IDAHO STATS., 19-2515(g)(5); ILLINOIS CRIM. CODE, ch. 38, 9-1(b)(7); LOUISIANA CODE CRIM. PROC., art. 905.4(g); MISSISSIPPI CODE ANN., 99-19-101(5)(h); NEBRASKA REV. STATS., 29-2523(1)(d); NEW HAMPSHIRE CRIM. CODE, 630:5(II)(a)(7); NORTH CAROLINA GEN. STATS., 15A-2000(e)(9); OKLAHOMA STATS. ANN., Tit. 21-701.12(4);

(continued...)

13. (...continued)
TENNESSEE CODE ANN., 39-2-203(i)(5); UTAH CODE ANN., 76-5-202(I)(g); WYOMING STATS., 6-2-102(h)(vii).) In these 17 states, the constitutionality of the statutes has been expressly litigated and upheld in 11 states. See *Ex Parte Kyzer*, 399 So.2d 330, 333-334 (Ala. 1981); *State v. Gretzler*, 659 P.2d 1, 9-12 (Ariz. 1983); but see *Adamson v. Ricketts*, __ F.2d __ (9th Cir. 1988) (No. 84-2069) [Arizona statute unconstitutional as applied]; *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); *State v. English*, 367 So.2d 815, 823 (La. 1979); *State v. Osborn*, 631 P.2d 187, 199-200 (Idaho 1981); *Washington v. State*, 361 So.2d 61, 65-66 (Miss. 1978); *State v. Palmer*, 399 N.W.2d 706, 725-732 (Neb. 1986); *State v. Goodman*, 257 S.E.2d 569, 585 (N.C. 1979); *Stouffer v. State*, 742 P.2d 562, 563-564 (Okl. Cr. 1987); but see *Maynard v. Cartwright*, 486 U.S. ____, 100 L.Ed.2d 372, 108 S.Ct. 1853 [Oklahoma statute unconstitutional as applied]; *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985); *Hopkinson v. State*, 632 P.2d 79, 152-154 (Wyo. 1981).

In some of these 17 states, their statutes have been upheld, expressly or implicitly, in the following federal cases. See *Jeffers v. Ricketts*, 832 F.2d 476, 482-483 (9th Cir. 1987) [Arizona; but see *Adamson v. Ricketts*, __ F.2d __ (9th Cir. 1988) (No. 84-2069)]; *Hargrove v. Wainwright*, 804 F.2d 1182, 1192-1196 (11th Cir. 1986) [Florida; vacated on other grounds on rehearing 809 F.2d 1486]; *Rault v. Butler*, 826 F.2d 299, 306-308 (5th Cir. 1987) [Louisiana]; *Gray v. Lucus*, 677 F.2d 1086, 1105 (5th Cir. 1982) [Mississippi]; *Holtan v. Black*, 838 F.2d 984, 985-986 (8th Cir. 1988) [Nebraska]; *Turner v. Bass*, 753 F.2d 342, 350-353 (4th Cir. 1985) [Virginia; reversed on other grounds, *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 106 S.Ct. 1683 (1985)].

No state other than California, and no federal case, has ever held a statute which contains one of the concepts in California's "heinous, cruel or atrocious" phrase to be unconstitutional on its face.

As was stated by a dissenting justice in *Engert*, "It is significant that if an insurmountable 'vagueness problem' truly exists, we are the only court to discern it. My research discloses that *all other courts which have considered the issue, including the United States Supreme Court, have uniformly upheld identical or substantially identical language defining special or aggravating circumstances in state death penalty legislation* as against similar vagueness attacks." 31 Cal.3d at 810. Our research indicates that this statement is as true today as it was at the time of the dissent. At that time, the courts of 10 sister states had upheld such a statute. Since the dissent was written, one more state (Alabama) has upheld a substantially identical statute and no state, other than California, has struck down such a statute.

The list of states upholding such a statute is even longer when cases considering different language with the same objective are taken into account. See *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 224-232 (1987) ["outrageously wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"]; *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554, 564-566 (1984) [same]; Hance v. State, 245 Ga.

(continued...)

CONCLUSION

So long as constitutional principles are not violated, a state may adopt whatever criteria it deems appropriate for death penalty eligibility. The electorate in California deemed the selection of such criteria to be so important that in 1978 they enacted legislation by an initiative which set forth the criteria for death penalty eligibility and included therein as one criterion murder "especially heinous, atrocious and cruel." (§ 190.2(a)(14).) The California courts struck down that particular criterion on the ground that it violated both the federal and state constitutions. In so doing, the California Supreme Court considered neither a "narrowing principle" nor a "limiting construction" of subdivision (a)(14). Instead, in *Engert*, the Court simply said that the language of the statute could never satisfy constitutional concern for due process. This Court thereafter rejected that kind of an analysis in reviewing a statute which contained the language at issue in this case. Although the state court's error in analysis and result was brought to its attention in this case, the California Supreme Court has refused to reexamine *Engert*. Yet it is now clear that a court can uphold a statute which provides the possibility of a death penalty for an "especially heinous, atrocious and cruel" murder, even though, as in this case, the murder did not meet any other death eligible criteria.

This Court demonstrated sufficient interest in the question presented by this case by granting certiorari in *Engert* when it was before the California Court of Appeal. *California v. Superior Court*, 449 U.S. 945. On remand from this Court, the

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13. (...continued)
856, 268 S.E.2d 339, 344-346 (1980), cert. den. 449 U.S. 1067, reh. den. 449 U.S. 1135 [same]; *State v. Griffen* ___ Mo. ___, ___ S.W.2d ___ (No. 69733 July 26, 1988) [torture or depravity of mind, the result of which was outrageously or wantonly vile, horrible or inhuman]; *Cavanaugh v. State* (Nev. 1986) 729 P.2d 481, 486 ["torture, depravity of mind or the mutilation of the victim"].

Court of Appeal certified that its majority had relied upon both state and federal grounds. When the state Supreme Court then took over *Engert*, it also decided on state and federal grounds. Thus, this Court was unable to consider the issue present in this case at that time despite its expressed interest. The issue has returned, and this Court now has the ability to review it and, hopefully, from the standpoint of the People, validate the will of the California electorate.

The People of the State of California therefore respectfully pray that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

IRA REINER
District Attorney
County of Los Angeles, California

by

HARRY B. SONDHEIM
Head Deputy
Appellate Division

BRENT RIGGS
Deputy District Attorney

APPENDIX

NOT TO BE PUBLISHED

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE, Plaintiff and Appellant, v. KHALID PARWEZ, Defendant and Respondent.	) No. B033193) (Super.Ct.No.) A887428))) Court of) Appeal -) Second District) FILED) SEP 13 1988) Robert N.) Wilson Clerk)

APPEAL from an order of the Superior Court of Los Angeles County. Robert Martinez, Judge. Affirmed.

Ira Reiner, District Attorney, Harry B. Sondheim, Head Deputy District Attorney, and Brent Riggs, Deputy District Attorney for Plaintiff and Appellant.

Leslie H. Abramson, for Defendant and Respondent.

The People appeal from an order denying a motion pursuant to Penal Code section 871.5.

The defendant is charged with murder, and the People had alleged as a special circumstance that the murder was especially heinous, atrocious and cruel. (Pen. Code, § 190.2,

subd. (a)(14).) The magistrate sustained a demurrer to that special circumstance allegation, and the People sought review pursuant to Penal Code section 871.5. The Superior Court denied the motion to reinstate the special circumstances allegation concluding, as the magistrate had done, that the allegation was barred by reason of People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 806.

The sole ground urged for reversal is that the Supreme Court's decision in Engert is erroneous. The People, however, concede in their opening brief that this court is bound by the decisions of the California Supreme Court.

A stipulation[1] signed by the parties' attorneys has been filed in this court. In the stipulation the parties consent to the affirmance of the Superior Court's order pursuant to Engert. The stipulation has been also construed as a waiver of the need for a respondent's brief and a waiver of oral argument. The order will be affirmed. (See People v. Williams (1946) 73 Cal.App.2d 852.)

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1. "Under compulsion of Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, it is hereby stipulated that on or after August 27, 1988, the judgment in this case may be affirmed by the Court of Appeal, Division 5, pursuant to People v. Superior Court (Engert) 1982 31 Cal.3d 366 [sic], without prejudicing the efforts of appellant to seek reconsideration in this pending case by the California Supreme Court of the holding in Engert and without prejudicing the legal position of appellant during the course of such efforts since this stipulation is intended to only be binding in the Court of Appeal."

The order under review is affirmed.
NOT TO BE PUBLISHED.

LUCAS, P. J.

We concur:

BOREN, J.

KENNARD, J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 5, No. B033193

S007594

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

KHALID PARWEZ

Supreme Court
FILED
DEC 22 1988
Clerk

Appellant's petition for review DENIED.

LUCAS
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Appellant, v. KHALID PARWEZ, Defendant and Respondent.	) 2d Crim) B033193) Sup. Ct. No.) A887428))) ORDER)

Court of Appeal - Second Dist.
F I L E D

JAN 9 1989
ROBERT N. WILSON Clerk

THE COURT:
Application of appellant for stay of issuance of remittitur is granted. Remittitur shall now issue on March 24, 1989.

Lucas
Presiding Justice

CALIFORNIA PENAL CODE SECTION 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(vii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. *(Added by § 6 of Initiative Measure approved Nov. 7, 1978.)*

CALIFORNIA PENAL CODE SECTION 871.5

(a) When an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 10008, 1381, 1381.5, 1385, 1387, or 1389, or a portion thereof is dismissed pursuant to those same sections which may not be charged by information under the provisions of Section 739, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate.

(b) Notice of the motion shall be made to the defendant and the magistrate. The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.

(c) The superior court shall hear and determine the motion on the basis of the record of the proceedings before the magistrate. If the motion is litigated to decision by the prosecutor, the prosecution is prohibited from refiling the dismissed action, or portion thereof.

(d) Within 10 days after the magistrate has dismissed the action or a portion thereof, the prosecuting attorney may file a written request for a transcript of the proceedings with the clerk of the magistrate. The reporter shall immediately transcribe his or her shorthand notes pursuant to Section 869 and file with the clerk of the superior court an original plus one copy, and as many copies as there are defendants (other than a fictitious defendant). The reporter shall be entitled to compensation in accordance with the provisions of Section 869. The clerk of the superior court shall deliver a copy of the transcript to the prosecuting attorney immediately upon its

receipt and shall deliver a copy of the transcript to each defendant (other than a fictitious defendant) upon his or her demand without cost.

(e) When a court has ordered the resumption of proceeding before the magistrate, the magistrate shall resume the proceedings and when so ordered, issue an order of commitment for the reinstated offense or offenses within 10 days after the remittitur is filed in the superior court. Upon receipt of the remittitur, the superior court shall forward a copy to the magistrate.

(f) Pursuant to paragraph (9) of subdivision (a) of Section 1238 the people may take an appeal from the denial of the motion by the superior court to reinstate the complaint or a portion thereof. If the motion to reinstate the complaint is granted, the defendant may seek review thereof only pursuant to Sections 995 and 999a. Such review may only be sought in the event the defendant is held to answer pursuant to Section 872.

(g) Nothing contained herein shall preclude a magistrate, upon the resumption of proceedings, from considering a motion made pursuant to Section 1318.

If the superior court grants the motion for reinstatement and orders the magistrate to issue an order of commitment, the defendant, in lieu of resumed proceedings before the magistrate, may elect to waive his or her right to be committed by a magistrate, and consent to the filing of an amended or initial information containing the reinstated charge or charges. After arraignment thereon, he or she may adopt as a motion pursuant to Section 995, the record and proceedings of the motion taken pursuant to this section and the order issued pursuant thereto, and may seek review of the order in the

manner prescribed in Section 999a. *(Added by Stats.1980, c. 938, § 4. Amended by Stats.1981, c. 714, § 328; Stats.1981, c. 854, § 3; Stats.1982, c. 466, § 80; Stats.1982, c. 671, § 1; Stats.1982, c. 1505, § 2.)*

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF LOS ANGELES
BUREAU OF SPECIAL OPERATIONS

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IRA REINER, DISTRICT ATTORNEY R. DAN MURPHY, DIRECTOR
GILBERT GARCETTI, CHIEF DEPUTY DISTRICT ATTORNEY
CURT LIVESAY, ASSISTANT DISTRICT ATTORNEY

August 24, 1988

Court of Appeal
Second Appellate District
3580 Wilshire Boulevard, Room 301
Los Angeles, California 90010

Honorable Justices:

RE: People v. Khalid Parwez
No. B-033193; A0887428

In connection with appellant's agreement that this case may be affirmed pursuant to Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, it should be noted that, since appellant has no basis for knowing at this time what the California Supreme Court will do in this case and since, in appellant's view, this case presents a federal question because People v. Engert (1982) 31 Cal.3d 797 was decided on both state and federal grounds, it is appellant's understanding that an affirmance herein by this Court does not preclude appellant from seeking review in the

United States Supreme Court, depending upon the result in the California Supreme Court. Resolution of appellant's right to federal review is, of course, premature at this time, and, in any event, would be a question to be resolved by the United States Supreme Court.

Respectfully submitted

IRA REINER
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

rem

c: (See attached Declaration of Service by Mail.)